

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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BRIEF FOR APPELLANTS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 20,933

FILED AUG 1 1967

GORDON A. MAGRUDER, Appellant

Nathan J. Paulson
CLERK

v.

UNITED STATES OF AMERICA, Appellee

No. 20,959

RONALD WILLIAMS, Appellant

v.

UNITED STATES OF AMERICA, Appellee

On Appeal from the United States District Court for the
District of Columbia

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QUESTION PRESENTED

Are appellants' convictions entered prior to Kent v. United States, 383 U.S. 541 upon waiver of jurisdiction by the Juvenile Court valid, although the Juvenile Court held no hearing and did not afford them representation by counsel, as Kent requires?

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

These are appeals in forma pauperis from judgments of the District Court dismissing appellants' motions under 28 U.S.C. §2255 to set aside sentences previously imposed by the District Court after waiver of jurisdiction by the Juvenile Court. This Court has jurisdiction of the appeals under 28 U.S.C. §1291.

STATEMENT OF THE CASE

These are separate appeals from orders of the District Court denying relief sought under 28 U.S.C. § 2255. In both cases the motions stated that the sentences which appellants moved to set aside were unlawful because entered subsequent to a waiver of jurisdiction by the Juvenile Court which did not comply with the procedural requirements established in Kent v. United States, 383 U.S. 541. In neither case did the Court below hold a hearing on the motion to vacate the sentence or write an opinion. Because of the narrowness of the issue presented and the absence of a hearing below, the pertinent facts can be briefly stated:

Magruder v. United States, case No. 20,933. Magruder was arrested on July 3, 1957. At that time he was less than 17 years old and was bound over to the Receiving Home for Children. On July 18 the Juvenile Court waived jurisdiction over him as well as two others, Maxie Leroy Pee and Leroy S. Johnson, who had been arrested for the same offense. As petitioner alleged in his petition below (p.2), the Juvenile Court held no hearing at which appellant was present, nor was he represented by any attorney to protect his interests. Subsequently, appellant, as well as the other two juveniles and two adults, James E. Curtis and James O. Harris, were indicted for rape and assault with a dangerous weapon. A trial was held before Judge Tamm, and appellant was found guilty with intent to assault and intent to commit

rape and robbery, and sentenced to 5-15 years imprisonment. He thereupon appealed, and this Court set aside the conviction and remanded the case to the District Court with directions to hold a hearing as to whether statements taken from appellant were inadmissible under Mallory v. United States, 354 U.S. 499. Pee v. United States, 274 F. 2d 556, 561. The District Court held such a hearing and concluding that there had been no violation of the Mallory rule, reaffirmed its original judgment and sentence.

Williams v. United States, case No. 20,959. Williams was indicted in October 1963 for robbery. In September Chief Judge Miller of the Juvenile Court, had waived jurisdiction over him. In support of his motion below Williams filed an affidavit asserting that the Juvenile Court's waived with holding a hearing. This allegation was not denied in the opposition to his motion filed by the Government below. On November 20, 1963 Williams was found guilty by a jury and was sentenced on January 20, 1964 by Judge Schweinhaut under the Federal Youth Corrections Act, 118 U.S. App. D.C. 190, 338 F. 2d 530. On November 12, 1964 Williams' second trial began. A jury found him guilty on November 16, 1964 and on January 8, 1965 Judge Schweinhaut sentenced him to 16 months to four years imprisonment. On January 12, 1965 Williams filed a notice of appeal but latter entered into a stipulation dismissing the appeal.

STATUTES INVOLVED

This case involves 28 U.S.C. §2255 and 11 D.C. Code §1553

(Sup. IV. 1965). They are reprinted in pertinent part in the Appendix, P. 1a, infra.

STATEMENT OF POINTS

The Appellants' sentences were invalid because the District Court waived jurisdiction over them without following the procedures required by Kent v. United States, 383 U.S. 541.

SUMMARY OF ARGUMENT

Appellants were convicted of crimes by the District Court, which obtained jurisdiction over them pursuant to a waiver by the Juvenile Court. The waiver was made without a hearing at a time when appellants were unrepresented by counsel. The waiver was therefore invalid under Kent v. United States, 383 U.S. 541.

The effect of Kent on appellants' rights is not affected by the circumstance that their convictions became final before Kent was decided. It has been the almost universal practice to give retroactive effect to judicial decisions. This practice was followed even when the Supreme Court, overruling prior precedent, held that the defendants were entitled to counsel in all felony cases, although the effect of granting retroactivity was to upset countless convictions which had been obtained under

the reversed doctrine. Full retroactivity to constitutional decisions has been denied by the Supreme Court in only four cases: Linkletter v. Walker, 381 U.S. 618; Tehan v. Shott, 382 U.S. 406; Johnson v. New Jersey, 384 U.S. 719; and Stovall v. Denno, 87 S.Ct. 1967. In Stovall, the most recent of these four cases, the Court set forth three criteria by which retroactivity or non-retroactivity should be judged: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." 87 S.Ct. at 1970. If these criteria are applied, full retroactivity should be afforded to the Kent case.

A hearing and representation by counsel at such a hearing are essential to the integrity of the fact-finding process. The right to a hearing is of the essence of due process of law. Indeed, the Supreme Court's decisions granting full retroactivity to rules providing for counsel at arraignment, trial, and on appeal conclusively determine the issue here.

Additionally, the elements which militate against retroactivity are substantially weaker in this case than in the four cases in which the Supreme Court has denied retroactivity. To begin with, there was here no reliance on a decision by the highest court of the jurisdiction, since the Supreme Court had

not, before Kent, spoken on the subject of the procedures in Juvenile Court waivers. To deny full retroactivity to a decision of the highest court because of prior decisions of intermediate courts would give the latter the de facto power to finally declare the law for all cases arising before the highest court acts. Moreover, the present case, unlike the four cited cases, involves a limited class of defendants: Kent affects the past convictions of juveniles, and only of those juveniles over whom waiver was authorized (those who were above 16 years or were charged with especially serious offenses) and effectuated. Finally, the impact on the administration of justice of granting retroactivity to Kent would not be exceptionally severe, and would, indeed, be far less than the grant of retroactivity to the right-of-counsel cases. All that Kent requires is a new waiver hearing. If waiver is granted, the indictment will be dismissed, unless the defendant is still a juvenile, in which case he could be retried by the Juvenile Court. If the waiver is reaffirmed, nothing else must be done. On the other hand, as the Supreme Court emphasized in the cases where it denied retroactivity, application of the rules there involved to past convictions would have had a devastating effect on the criminal process.

It was pointed out in Johnson v. New Jersey that even assuming full retroactivity is not constitutionally required,

the states are free to be more generous than the Supreme Court. The factors already discussed demonstrate that this Court should grant retroactivity to Kent either in the exercise of its discretion or as an interpretation of the Juvenile Court Act.

It was conceded in the Court below in the Williams case that these actions are properly brought under 28 U.S.C. §2255. Accordingly, if, as we urge, Kent is applicable here, the judgments of the District Court should be reversed and the petitions under 28 U.S.C. §2255 should be reinstated.

ARGUMENT

In Kent v. United States, 383 U.S. 541, the Supreme Court authoritatively construed the provisions of the Juvenile Court Act dealing with waiver of jurisdiction by the Juvenile Court to the District Court. The Supreme Court held that prior to such waiver, (1) there must be a hearing, (2) at which the juvenile is entitled to be represented by counsel, (3) who is entitled to see the social record of the juvenile which was prepared to assist the Court in determining the propriety of the waiver, and (4) that the Juvenile Court must, if it decides to waive jurisdiction, state its reasons therefor. Appellants were sentenced by the District Court pursuant to convictions obtained after waivers of jurisdiction by the Juvenile Court and before Kent was decided. Their motions for relief under 28 U.S.C. §2255 allege that they were denied a hearing and the assistance of counsel prior to waiver. They are therefore entitled to the same relief which Kent obtained unless the decision of the Supreme Court is to be denied retroactive application. We submit that there is no justification for thus limiting the Kent decision, and that the judgment below should be reversed with appropriate directions to the District Court.

In approaching the problem of this case, it is important to keep in mind the obvious proposition that denial of retroactive effect to judicial decisions is a rare exception in our jurisprudence. Prior to Linkletter v. Walker, 381 U.S. 618,

the Supreme Court had given retroactive effect to all its Constitutional decisions on criminal procedure even where severe dislocations resulted therefrom. The Court's failure to explain these actions by no means detracts from their significance; rather, it reveals that the Court was consciously acting in accordance with essential principles of adjudication which, unlike legislation, operates in both directions of time. That this is the explanation of the Court's silence on the issue, rather than a failure to recognize its existence, is strongly confirmed by those decisions in which retroactive application was given its decisions despite strong dissents.

In Eskridge v. Washington Prison Board, 357 U.S. 214, decided in 1958, the Court applied the rule of Griffin v. Illinois, 351 U.S. 12 in a habeas corpus proceeding brought to set aside a conviction entered in 1935. In Griffin, decided in 1956, the Court had held that a state violated the Fourteenth Amendment if it limited appeals to all convicted defendants who could afford to pay for transcripts of their trial records. There was no opinion for the Court in Griffin because Mr. Justice Frankfurter, whose vote was necessary for a majority, wrote a separate concurring opinion urging that the scope of the decision be in some unspecified manner limited to cases arising in the future. However, when the issue of the effect to be given to Griffin arose in Eskridge, the majority of the Court applied Griffin to require Illinois to grant an in forma pauperis appeal

from a conviction which had been entered in 1935. Justices Harlan and Whittaker dissented from this action on the express ground that Griffin had been decided 21 years after Eskridge had been convicted.

A retroactivity problem of momentous practical impact was created by Gideon v. Wainwright, 372 U.S. 335, which overruled Betts v. Brady, 316 U.S. 455, to hold that defendants in all felony cases have a constitutional right to counsel. Gideon itself involved review by habeas corpus of a conviction which had previously become final, but there was no dissent on the ground that the new right-to-counsel rule should be applied only in direct appeals from convictions in which counsel had been denied or that it should otherwise be restricted in its application.^{1/} However, in Pickelsimer v. Wainwright, 375 U.S. 2, Mr. Justice Harlan dissented by opinion from the Court's reversal without argument, on the authority of Gideon, of a conviction which had

^{1/} The Court could not have been unconscious of the problem of the impact of Gideon on convictions which had previously become final, since it simultaneously decided Fay v. Noia, 372 U.S. 391, which substantially expanded the scope of federal review in habeas corpus proceedings of the constitutionality of state convictions.

2/

been entered while Betts v. Brady was the law; and he later reiterated his view that the issue of Gideon's retroactivity should be given plenary consideration. LaVallee v. Durocher, 377 U.S. 998 (dissent from denial of certiorari.) He likewise protested vigorously when the Court tacitly gave retroactive effect to Jackson v. Denno, 378 U.S. 368, which, overruling Stein v. New York, 346 U.S. 156, held that a defendant was entitled to a determination by the trial judge of the voluntariness of his confession, 378 U.S. at 439-440 (dissenting opinion). The Court's silent granting of retroactive effect to its decisions over these strong protests (doubtless elaborated in conference) strongly suggests that the system's assumption of retroactivity was thought to make reply to these protests unnecessary.

It is within this context that Linkletter v. Walker, 381 U.S. 618 and the Court's subsequent decisions limiting the effect of its constitutional holdings must be examined. In addition to Linkletter, the relevant cases are Tehan v. Shott, 382 U.S. 406; Johnson v. New Jersey, 384 U.S. 719; Stovall v. Denno, 387 S.Ct. 1967. In Linkletter the Court held that the rule of Mapp v. Ohio, 367 U.S. 643 would not be applied to convictions which had become final before the decision in Mapp was announced.

2/ On the same day, over Mr. Justice Harlan's objection, the Court gave retroactive effect to Douglas v. California, 372 U.S. 353 which guaranteed the right of counsel on appeal from a state criminal conviction. Daegle v. Kansas, 375 U.S. 1.

Tehan v. Shott applied the same rule to Griffin v. California, 380 U.S. 609 which had held that a defendant's federal privilege against self-incrimination was violated if the prosecutor commented to the jury on the defendant's failure to take the stand at trial. Johnson v. New Jersey dealt with the effect to be given to Escobedo v. Illinois, 378 U.S. 478 and Miranda v. Arizona, 384 U.S. 436, which sharply restricted the admissibility of convictions given by the defendant while he was in police custody. The Court decided in Johnson that Escobedo would be available only to defendants whose trials began after June 22, 1964 the date on which Escobedo was decided. The Court also held that the "additional guidelines" of Miranda, see 384 U.S. at 734, are available only to defendants whose trials had not begun as of June 13, 1966, the date on which Miranda was decided. These limitations on retroactivity excluded not only persons who presented their constitutional claims in post-conviction proceedings (as in Linkletter and Tehan) but those whose convictions had not become final in the sense that their appeals were pending when Escobedo and Miranda were decided.^{4/} The Court was careful to point out, however, in Johnson that these limitations on retroactivity were not constitutional commands on the States:

"Of course, States are still entirely free to effectuate under their own law stricter standards than those we have laid

^{4/} Escobedo himself and the four defendants whose cases were decided in the Miranda opinion did, however, receive the benefits of the respective decisions in which they participated.

down and to apply those standards in a broader range of cases than is required by this decision." 384 U.S. at 733.

In Stovall v. Denno, the Court dealt with the effect to be given to Gilbert v. California 87 S.Ct. 1951 and United States v. Wade, 87 S.Ct. 1926, which require the exclusion of evidence identifying the defendant which is tainted because he was exhibited to identifying witnesses before trial in the absence of his counsel. The Court held in Stovall that this rule would be applicable only to prosecutions arising out of line-ups occurring after June 12, 1967, the date of the Wade, Gilbert, and Stovall decisions themselves.^{5/} Reaching this result, the Court in Stovall summarized and discussed its prior decisions on retroactivity, as follows:

Our recent discussions of the retroactivity of other constitutional rules of criminal procedure make unnecessary any detailed treatment of that question here. Linkletter v. Walker, supra; Tehan v. Shott, supra; Johnson v. New Jersey, supra. "These cases establish the principle that in criminal litigation concerning constitutional claims, 'the Court may in the interest of justice make the rule prospective...where the exigencies of the situation require such an application'..." Johnson, supra, 384 U.S. at 726-727. The criteria guiding reso-

^{5/} Wade and Gilbert themselves did benefit from the discussion in their cases though somewhat ironically the Court the same day denied Certiorari in another case in which Gilbert raised the same issue. Gilbert v. United States, 87 S.Ct. 2123. The Courts approval varied from that of Johnson, where the cut-off-date in Stovall was that of the beginning of the trial, rather than that of the allegedly unconstitutional event. No explanation of the difference was given in Stovall.

lution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. '[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved.' Johnson, supra, at 728.

Wade and Gilbert fashion exclusionary rules to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel. A conviction which rests on a mistaken identification is a gross miscarriage of justice. The Wade and Gilbert rules are aimed at minimizing that possibility by preventing the unfairness at the pretrial confrontation that experience has proved can occur and assuring meaningful examination of the identification witness' testimony at trial. Does it follow that the rules should be applied retroactively? We do not think so.

It is true that the right to the assistance of counsel has been applied retroactively at stages of the prosecution where denial of the right must almost invariably deny a fair trial, for example, at the trial itself, Gideon v. Wainwright, 372 U.S. 335, or at some forms of arraignment, Hamilton v. Alabama, 368 U.S. 52, or on appeal, Douglas v. California, 372 U.S. 353. "The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent." Tehan v. Shott, *supra*, at 416. We have also retroactively applied rules of criminal procedure fashioned to correct serious flaws in the fact-finding process at trial. See for example Jackson v. Denno, 378 U.S. 368. Al-

though the Wade and Gilbert rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence, 'the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree.' Johnson v. New Jersey, supra, at 728-729. The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities.' Ibid. Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice." 87 S.Ct. at 1970-71.

It is appropriate to examine the problem of the retroactivity of Kent in light of the three criteria which Stovall so recently and authoratively has held to be controlling:

a. The purpose to be served by the new standards. As the Court explained in Stovall, by "purpose" is meant the extent to which the rule of law whose retroactivity is in question is designed to further the fact-finding function of the criminal proceeding, that is in determining whether the defendant is guilty of the offense with which he is charged. In Linkletter v. Walker it had been stressed that the exclusionary rule of Mapp v. Ohio, 367 U.S. 643, is designed to secure privacy, but in no way guards against convicting the innocent. Again, in Tehan v. Shott, it was explained that the basic function of the rule of Griffin v. California is to sustain the privilege against self-incrimination, whose "basic purposes *** do not relate to protecting the innocent from conviction, but rather to preserving the integrity of [the]

judicial system ***." 382 U.S. at 415. The rules which were denied retroactivity in Johnson and Stovall do measurably support the integrity of the fact-finding process. But, as we have seen, the Court said in Johnson, and reiterated in Stovall "The question whether a rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree". And, treating the question as one of "probabilities", the Court in Johnson thought it was less likely that the exclusion of a confession obtained in violation of the Escobedo and Miranda principles would result in convicting the innocent than would, for example, the denial of counsel at trial ^{6/}, arraignment^{7/}, or on appeal^{8/}. It is clear that the procedural rights vouchsafed by Kent rank at the top of the scale of probabilities of importance to the fact-finding process. Kent guarantees the juvenile a hearing as a pre-condition to waiver. The right to a hearing is, of course, the most important guarantee which the law can provide that the truth will be discovered. It is for that reason that Mr. Justice Brandeis characterized the "opportunity to be heard and to defend [a] substantive right" as

6/ Gideon v. Wainwright, 372 U.S. 335.

7/ Hamilton v. Alabama, 368 U.S. 52.

8/ Douglas v. California, 372 U.S. 353.

due process of law "in its primary sense". Brinkerhoff-Farris Trust and Savings Co. v. Hill, 281 U.S. 673, 678. See also Armstrong v. Manzo, 380 U.S. 545, 552. All other procedural rights, such as the right to be represented by counsel and to confront and cross-examine hostile witnesses, are in aid of the fact-finding functions of a hearing. It is unthinkable that the Supreme Court, which has unhesitatingly given retroactive effect to the constitutional right of confrontation and cross-examination^{9/} should deny retroactivity where there has been no hearing at all. And, of course, the service which counsel can perform in the aid of truth at a waiver hearing is no less than that which he can perform at arraignment, trial or on appeal. Thus, the cases which allowed retroactivity to decisions granting right of counsel at each of those stages are controlling here.

b. The extent of reliance on law enforcement authorities on the old standards. In considering this standard, it must be questioned at the outset whether "reliance" in the Stovall sense

^{9/} See Brookhart v. Janis, 384 U.S. 1 and Parker v. Gladden, 385 U.S. 363, both giving retroactive effect to Pointer v. Texas, 380 U.S. 400.

can be claimed at all by those who would deny retroactivity to Kent. For Stovall used this term in the sense of reliance on decisions of the Supreme Court itself which were subsequently overruled. ^{10/} Yet, the standards which were altered by Kent were not those of the Supreme Court but of this Court, particularly Wilhite v. United States, 108 U.S. App. D.C. 279, 281 F.2d 642. Indeed, as the Supreme Court recognized, the authority of that decision had been severely impaired by this Court itself in Black v. United States, 122 U.S. App. D.C. 393, 355 F.2d 104 and Watkins v. United States, 119 U.S. App. D.C. 409, 343 F.2d 278. But even if Kent is considered to have overruled prior precedent ^{11/} the point remains that there was no reliance on any decision of the highest Court of the judicial

^{10/} To be sure, the Wade and Gilbert decisions, which were denied retroactivity in Stovall, did not expressly overrule any prior decisions. But these were expansions of the right of counsel recognized in Miranda and Escobedo, which themselves overruled prior Supreme Court decisions.

^{11/} We note in passing that if retroactivity is to be denied the Kent standards, the cut-off dates should, where pertinent, be this Court's decisions in Black and Watkins.

hierarchy. If reliance on decisions of intermediate courts were to justify denial of retroactivity to the ultimate exposition of the law by the highest tribunal, then the intermediate courts will have been given de facto power to finally declare the law for all cases arising prior to such decision of the highest tribunal.

Additionally, and perhaps more importantly, the extent of reliance on the standards which were altered by Kent does not approach that involved in any of the cases to which the Supreme Court denied retroactivity. The impact of Kent is confined to cases involving juveniles. Even among juveniles, Kent would affect only that portion whose waiver was authorized (because they were above 16 years old or charged with a particularly serious offense) and exercised, resulting in conviction. This is in sharp contrast to, for example, the rule of Griffin v. California, which forbids comment by prosecutors on the defendant's failure to take the stand. The Supreme Court "assumed that there has been comment in every single trial in the courts of [six states] in which the defendant did not take the witness stand -- in accordance with state law and with the United States Constitution as explicitly interpreted by this Court for 57 years." Tehan v. Shott, 382 U.S. at 418. The other cases denying retroactivity dealt with rules of even broader impact, ranging up to Stovall where the Court emphasized that "law enforcement officials of the federal government and of all 50 states have heretofore proceeded on the premise [rejected by Wade and Gilbert] that the Constitution did not require the presence of counsel at pretrial confrontations for identification."

Stovall v. Denno, 87 S.Ct. at 1971.

c. The effect on the administration of justice of a retroactive application of new standards. We must state that we do not know how many prosecutions would be affected by a retroactive application of Kent. Perhaps the United States will be able to provide a meaningful figure. In any event, the practical consequences in the cases which will have to be reopened because of Kent would be far less significant. Retroactivity of Griffin would have required new trials in every case. The other rules, if applied retroactively, would have required hearings as to the circumstances of the search and seizure, interrogation or line-up wherever it could be claimed that materials which were admitted in evidence had been obtained illegally, or a confession was introduced, or a line-up identification of the defendant figured in the prosecution. These hearings themselves would have required an enormous expenditure of the resources of the courts and other law enforcement officials. A large number of new trials would also have been required. By contrast the potential impact of the Kent decision is slight. Kent requires only a hearing by the Juvenile Court or by the District Court (which must be by the District Court if the juvenile has ceased to be a juvenile), to determine the propriety of waiver. While this reconstruction of the past may raise difficulties in individual cases, the informality of the waiver proceedings which Kent still allows

will ease the burden on the courts. Moreover, if in such a hearing it is decided that there should not have been a waiver, no new trial will be necessary. Rather, Kent requires that the indictment then be dismissed. If the defendant is still a juvenile, he could presumably be tried in the Juvenile Court, which we recognize may further aggravate the docket congestion of that Court. But keeping in mind the purpose of its creation, this seems a small price to pay to assure that no juvenile is erroneously and improperly denied the benefits of special treatment which they are afforded by the law.

In sum, if the Stovall criteria are applied to Kent, it appears that denial of retroactivity is less justified than in any of the cases in which it was denied by the Supreme Court, and the grant of full retroactivity is as justified as in those cases in which it granted full retroactivity. The Kent standards affect the integrity of the fact-finding processes even more directly than those established in the right-of-counsel cases to which retroactivity was granted. On the other hand, the extent of reliance by law enforcement officials and the adverse impact on the grant of retroactivity is far less in those cases where retroactivity was denied and, indeed, less than in some to which retroactivity was granted, particularly Gideon v. Wainwright whose retroactivity required the reopening of countless convictions throughout the nation,

some of which had been entered long ago. ^{12/}

We submit, therefore, that under the Stovall standards retroactivity may not be denied to Kent. We should perhaps anticipate an attempt to distinguish the Supreme Court's decisions on the ground that they dealt with the permissible denial of retroactivity of constitutional standards and that Kent rested on a construction of the Juvenile Court Act rather than of the Constitution. Even if such a distinction would otherwise be supportable where the basis of the standard is entirely outside the Constitution, ^{13/} that is not so with Kent. For, as the Supreme Court stated, the procedural rights asserted by Kent are "required by the statute read in the context of Constitutional principles relating to due process and the assistance of counsel." 383 U.S. at 541, 547. See also In re Gault, 387 U.S. 1.

^{12/} Since these appellants were denied a hearing and representation by counsel prior to the District Court's waiver, the judgments below must be reversed if retroactivity is to be granted to either of these procedural rights. The retroactivity of the other two standards which Kent established therefore need not be discussed.

^{13/} We think the distinction is unsupportable. In Johnson v. New Jersey the Supreme Court was careful to point out that the granting and denial of retroactivity did not depend on the value

In Johnson v. New Jersey, the Court said that the states were free to give broader retroactivity to the Supreme Court's Miranda and Escobedo decisions than Johnson required. 384 U.S. at 733. Similarly, even if this Court should hold that the Stovall criteria do not constitutionally require that full retroactivity be given to Kent, this Court would have power to do so as a matter of discretion or as an interpretation of the Congressional intent in passing the Juvenile Court Act. The same considerations which we have already discussed require a fortiori that the Court grant full retroactivity to Kent on these alternative grounds. We note in this connection that the Court has twice denied retroactivity to decisions involving juveniles. In Shioutakon v. United States, 98 U.S. App. D.C. 271, 275, 236 F.2d 666, 670, the Court held that the right of counsel at the Juvenile Court hearing, resulting in a commitment of the juvenile would be applied only "in this case and in similar cases in the future." However, this limitation

of the Constitutional guarantee involved. 384 U.S. at 728. By a parity of reasoning, the choice between retroactivity and non-retroactivity should not depend on whether the source of the rule is the statute or a higher legal norm, the Constitution.

seems no longer supportable in light of the decisions giving full retroactivity to the equivalent right to counsel at a criminal trial. ^{14/}

The Court also denied full retroactivity to its decision in Harling v. United States, 111 U.S. App. D.C. 174, 295 F.2d 161 that pre-waiver statements made by a juvenile in connection with non-criminal proceedings in Juvenile Court must be excluded from evidence at his criminal trial in the District Court. The Court did not expound on the reasons for this approach, from which three members of the Court dissented. 111 U.S. App. D.C. 177, 295 F.2d at 164, n. 13. However, we may

^{14/} The Court in Shioutakon v. United States cited Mr. Justice Frankfurter's concurring opinion in Griffin v. Illinois, subsequently rejected by the Supreme Court, and this Court's decision in Durham v. United States, 94 U.S. App. D.C. 228, 240, 214 F.2d 862, 874. In Durham the Court said: "In the District of Columbia, the formulation of tests of criminal responsibility is entrusted to the courts and, in adopting a new test, we invoke our inherent power to make the change prospectively." In other words, the Court was exercising a function analogous to that of the legislature, which made it reasonable to follow the legislative practice of prospective lawmaking.

surmise that the Court was concerned about the necessity for a retrial of the great majority, if not all, cases in which juveniles had been prosecuted and convicted. Granting retroactivity to Kent would not have such effect. Moreover, the Harling rule was similar to that of Escobedo and Miranda in that while there was some danger of the unreliability of the statements which the rule sought to exclude, the statements were not inherently untrustworthy. In short, we submit that this Court's decisions in no way militate against the exercise of discretion in favor of retroactivity to the Kent decision.

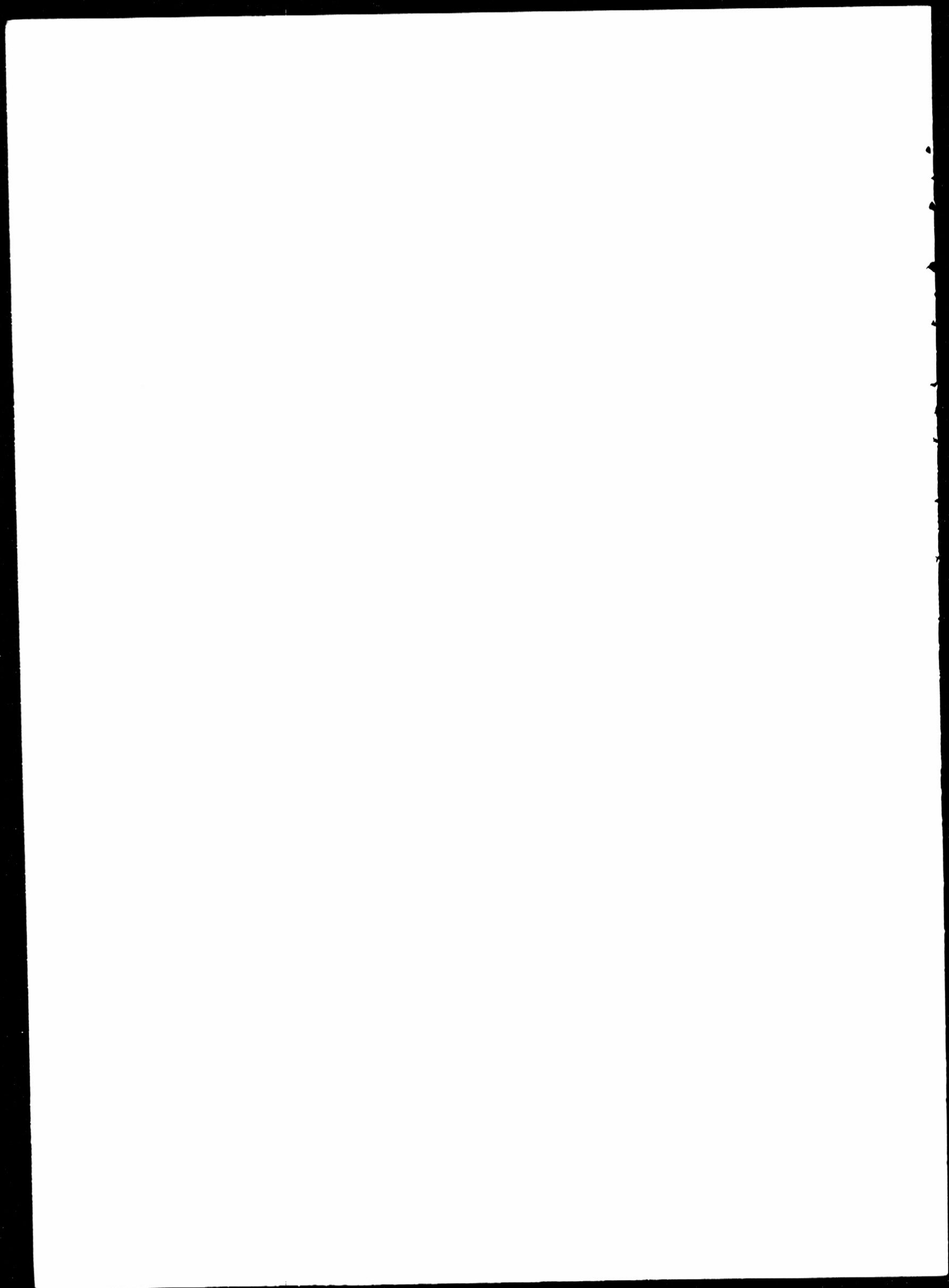
As the Government acknowledged in the Court below in the Williams case, if Kent is to be applied retroactively, appellants are entitled to relief under 28 U.S.C. §2255. ^{15/} Accordingly, the judgments of the District Court should be reversed with directions to hold a hearing on the allegations of appellants' petitions under 28 U.S.C. §2255.

Respectfully submitted,

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^{15/} See Opposition to Motion for Declaratory Judgment, etc., para. 5, filed by the Government below.



APPENDIX
STATUTES INVOLVED

28 U.S.C. §2255 reads in pertinent part as follows:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, or that the court was without jurisdiction in impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

11 D.C. Code §1553 (Supp. IV, 1965) reads as follows:

When a child 16 years of age or over is charged with an offense which if committed by a person 18 years of age or over is a felony, or when a child under 18 years of age is charged with an offense which if committed by a person 18 years of age or over is punishable by death or life imprisonment, a judge may, after full investigation, waive jurisdiction and order the child held for trial under the regular procedure of the court which would have jurisdiction of the offense if committed by a person 18 years of age or over; or the other court may exercise the powers conferred upon the Juvenile Court by this chapter and subchapter I of chapter 23 of Title 16 in conducting and disposing of such cases.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA ~~United States~~ Court of Appeals
for the District of Columbia Circuit

No. 20,933

FILED SEP 11 1967

GORDON A. MAGRUDER, APPELLANT

Nathan J. Paulson
CLERK

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,959

RONALD WILLIAMS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
LEE A. FREEMAN, JR.,
Assistant United States Attorneys.

C.A. 116-67, 2317-66

QUESTION PRESENTED

In the opinion of appellee, the following question is presented: Should the holding in *Kent v. United States*, 383 U.S. 541 (1965), be given retroactive effect? More specifically, may juvenile offenders who were waived by the Juvenile Court and whose convictions became final before the *Kent* decision now collaterally attack the procedure for waiver?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,933

GORDON A. MAGRUDER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,959

RONALD WILLIAMS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The Juvenile Court waived jurisdiction over appellants after full investigation, but without an adversary hear-

ing. Both appellants were tried and convicted on criminal charges in the District Court, and their convictions were affirmed before the Supreme Court handed down its decision in *Kent v. United States*, 383 U.S. 541 (1966). In addition, these convictions became final prior to this Court's ruling in *Black v. United States*, 122 U.S. App. D.C. 393, 355 F.2d 104 (1965). The appellants have sought to vacate their sentences under 28 U.S.C. § 2255, claiming that *Kent* should be applied retroactively to invalidate the waiver of jurisdiction.¹ These consolidated appeals challenge the denial of relief by Judges Gasch and Schweinhaut.

SUMMARY OF ARGUMENT

In four recent cases, the Supreme Court has given only prospective application to decisions that overturned existing constitutional standards for criminal procedure. For this purpose, the Supreme Court has sharply distinguished decisions which protect the accuracy and trustworthiness of the trial's fact-finding process from those which serve other values. Only cases within the first category have been given retroactive application, since only in such cases have the prior rules threatened innocent men with convictions.

Kent, like the four prospective cases, protects constitutional rights which are entirely unrelated to the fact-finding and truth-determining functions of the trial. The procedure whereby the Juvenile Court decides whether to waive jurisdiction over a youthful offender to the District Court nowise affects the ultimate verdict as to guilt. The waiver merely alters the tribunal which makes this crucial decision.

Before *Kent*, the Juvenile Court discharged this responsibility in reasonable and good faith reliance upon the law as defined by the highest court of this jurisdic-

¹ The same result would follow from retroactive application of *Black*. Therefore, the *Kent* and *Black* decisions are discussed interchangeably.

tion. All pre-*Kent* waiver determinations were made after a full judicial investigation, but without an adversary hearing—a practice explicitly sanctioned by this Court of Appeals. The Juvenile Court acted as an impartial arbiter, rather than as a zealous law enforcement authority, and waived jurisdiction only in exceptional cases. Moreover, *Kent* was unheralded by earlier decisions hinting at the overhaul of waiver procedures.

Finally, the disruptive consequences to the administration of justice which would flow from the retroactive application of *Kent* strongly recommends prospective limitation.

ARGUMENT

The Supreme Court's holding in *Kent v. United States* should not be applied retroactively to upset convictions that became final before March 21, 1966, the date of the *Kent* decision.²

Since 1965, the Supreme Court has four times refused to give retroactive effect to decisions which significantly expanded the pretrial constitutional safeguards afforded criminal suspects. The first decision, *Linkletter v. Walker*, 381 U.S. 618 (1965), limited the temporal reach of the rule excluding evidence seized during an illegal search.³ This precedent was followed by *Tehan v. Shott*, 382 U.S. 406 (1966), which refused to give retroactive application to the proscription against prosecutorial comment upon the accused's failure to testify.⁴ The next decision in this

² This appeal does not concern the question whether *Kent* should afford relief to criminals who had been waived by the Juvenile Court and convicted in the District Court, but whose convictions had not been affirmed, before the *Kent* opinion. Compare the holding in *Johnson & Cassidy v. New Jersey*, 384 U.S. 719 (1966), that *Escobedo* and *Miranda* apply only to trials taking place after the dates of those decisions.

³ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁴ *Griffin v. California*, 380 U.S. 609 (1965).

line, *Johnson & Cassidy v. New Jersey*, 384 U.S. 719 (1966), imposed the recently-fashioned restrictions upon custodial interrogation of suspects only as to trials begun after those decisions were announced.⁵ During its most recent term, the Supreme Court declared that decisions which created the right to counsel during police line-ups⁶ would not govern any previous identifications. *Stovall v. Denno*, 87 Sup. Ct. 1967 (1967). These opinions explicitly recognize that a prisoner's detention may be deemed lawful if his conviction conformed with "previously announced constitutional standards." *Johnson & Cassidy v. New Jersey*, 384 U.S. at 731.⁷ Of course, the Supreme Court has not embraced prospectiveness in all criminal cases. The choice turns upon the test articulated in *Linkletter*, 381 U.S. at 636:

"In short, we must look to the *purpose* of the [new] rule; the *reliance* placed upon the [old] doctrine, and the *effect on the administration of justice* of a retroactive application of [the new rule]." (emphasis added).

The same factors that convinced the Supreme Court to cushion the impact of its other decisions militate even more heavily against giving retroactive effect to *Kent*. As in *Linkletter*, *Tehan*, *Johnson & Cassidy*, and *Stovall*,

⁵ *Escobedo v. Illinois*, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁶ *United States v. Wade*, 87 Sup. Ct. 1926 (1967); *Gilbert v. California*, 87 Sup. Ct. 1951 (1967).

⁷ The concept of prospective limitation is far from unique. The mere fact that a court establishes a new principle of law does not entitle one whose conviction has previously become final to reap the benefit of the decision. *Warring v. Colpoys*, 74 App. D.C. 303, 122 F.2d 642, cert. denied, 314 U.S. 678 (1941).

The existence of collateral attack in criminal cases impels frequent use of the prospective limitation device. Otherwise, salutary developments in the law might founder upon a reluctance to free prisoners who have already been convicted. Indeed, this Court has often made its holdings prospective. E.g., *Durham v. United States*, 94 U.S. App. D.C. 228, 214 F.2d 862 (1954).

"we deal here with a doctrine which rests on considerations of quite a different order from those underlying other recent constitutional decisions which have been applied retroactively." *Tehan v. Shott*, 382 U.S. at 416.

a. *The "purpose" of Kent does not justify its retroactive operation.*

The Supreme Court has drawn a critical distinction between overturned procedures which had cast doubt upon the "very integrity of the fact-finding process" or created "the clear danger of convicting the innocent," and those practices which could no longer be tolerated because they offended other social interests. *Linkletter v. Walker*, 381 U.S. at 639; *Tehan v. Shott*, 382 U.S. at 416; *Johnson & Cassidy v. New Jersey*, 384 U.S. at 727-728. See Mishkin, *The High Court, The Great Writ, and Due Process of Time and Law*, 79 Harv. L. Rev. 56, 77-92 (1965). Consequently, retroactiveness attaches only to those decisions where the condemned practice has made the trial unfair and its determination of guilt unreliable.⁸ No other shift in the law may be seized upon to spearhead a collateral attack.

On this basis, *Kent* plainly falls within the ambit of nonretroactiveness. The purpose of *Kent*—to ensure that procedural fairness accompanies waiver—has no relation whatsoever to the crucial ascertainment of truth at trial. A waiver determination merely selects whether the Juvenile or District Court will decide the ultimate question of the accused's guilt or innocence. No facts bearing upon this final disposition are determined at the time of waiver. Nor are any legal defenses or substantial rights lost if not asserted when an offender is waived. Compare *Hamil-*

⁸ Most notably in the right-to-counsel cases, the Supreme Court has given its decisions retroactive effect. *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963) (retroactivity of *Gideon v. Wainwright*, 372 U.S. 335 (1963)); *Jackson v. Denno*, 378 U.S. 368 (1964); *Daegle v. Kansas*, 375 U.S. 1 (1963) (retroactivity of *Douglas v. California*, 372 U.S. 353 (1963)).

ton v. Alabama, 368 U.S. 52 (1961). In addition, a waiver hearing is not "technically intricate" but relatively informal. So the absence of "a lawyer's help" on the question whether to waive a juvenile does not impede the basic purpose of the subsequent trial itself, i.e., to uncover the truth. See *Tehan v. Shott*, 382 U.S. at 416.

Simply stated, the right established in *Kent*, like that defined in *Black*, has no bearing upon the "accurateness of the guilt-determining process." *Mordecai v. United States*, 252 F. Supp. 694, 703 (D.D.C. 1966). Just as the exclusionary rule cannot deter past police misconduct, no useful purpose would be served by the retroactive application of *Kent*.⁹

The choice to waive jurisdiction over a juvenile necessarily has other important consequences. But so does a decision to admit a confession, evidence gathered from a search, or testimony about a line-up identification.¹⁰ Attention must be focused solely on the effect of the right's deprivation upon the integrity of the trial's "fact-finding" or "truth-determining" functions. In this regard, the verdict is not rendered any less reliable because the Dis-

⁹ "Moreover, the right recognized in *Black* is not one related to the truthfulness of the guilt-determining process. The presence of counsel at a waiver hearing would seem to have even less to do with the 'fairness of the trial—the very integrity of the fact-finding process.' *Linkletter v. Walker*—than the rule forbidding prosecutors to comment on the accused's failure to testify which was considered in *Tehan* and found out to be aimed at guaranteeing a fair trial. *Black* rests not on any notion that an innocent man may be found guilty if counsel is not present at the waiver proceedings but on the growing awareness that . . . counsel may be helpful at every stage—not only during the trial. This humanitarian rule, although properly a subject for future application, should not be available to reverse convictions following fair trials long after they have become final." *Mordecai v. United States*, 252 F. Supp. at 703 (citation omitted).

¹⁰ When the Supreme Court declared that changes in the law governing these matters should only operate prospectively, it stressed that "the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional right involved." *Johnson & Cassidy v. New Jersey*, 384 U.S. at 728; *Linkletter v. Walker*, 381 U.S. at 629.

strict Court rather than the Juvenile Court tries the accused. Moreover, it is highly improbable that the outcome on the issue of guilt would vary with the different courts. Thus, there are even stronger reasons for limiting *Kent* to prospective application than those which caused the Supreme Court to withhold retroactive effect in *Linkletter*, *Tehan*, *Johnson & Cassidy*, and *Stovall*. For in those cases, it could be reasonably anticipated that the application of stricter rules on exclusion of evidence or prosecutorial comments would often alter the verdict.¹¹

b. The Juvenile Court's reliance upon pre-Kent doctrine was reasonable, as well as being in good faith.

The Supreme Court has repeatedly emphasized that reliance by law enforcement authorities upon previous legal doctrine weighs heavily against giving a novel decision retroactive effect. *E.g.*, *Tehan v. Shott*, 382 U.S. at 417; *Johnson & Cassidy v. New Jersey*, 384 U.S. at 731. In this instance, it cannot be questioned that the Juvenile Court relied upon prior rulings in good faith. Its adherence to the law hardly reflects a scheme to incarcerate victims before the citadel crumbled. In view of the Juvenile Court's fair-mindedness, this Court has time and again refused to make retroactive adjustment for newly-announced procedures with respect to the treatment of juveniles. *E.g.*, *Black v. United States*, 122 U.S. App. D.C. 393, 397, 355 F.2d 104, 108 (1965) (opinion delineated the right to counsel for subsequent waiver hearings and those cases which were still not final); *Harling v. United States*, 111 U.S. App. D.C. 174, 177, 295 F.2d 161, 164 (1961) (*en banc*). Even the right to appointed counsel for Juvenile Court trials was explicitly made non-

¹¹ By no means should this argument be taken to suggest that retroactiveness or nonretroactiveness in other contexts turns upon an outcome-determinative test.

retroactive. *Shioutakon v. District of Columbia*, 98 U.S. App. D.C. 371, 236 F.2d 666 (1956).¹²

Prior to its decision in *Black v. United States*, 122 U.S. App. D.C. 393, 355 F.2d 104 (1965), this Court had never intimated that Juvenile Court waiver procedures contravened the governing statute. The Juvenile Court Act's requirement that a "full investigation" precede waiver had been understood by the Juvenile Court to require review in its impartial and benevolent role of *parens patriae*, rather than an adversary proceeding. Waivers of jurisdiction made under this interpretation had been invariably sustained by the Court of Appeals, *Kent v. United States*, 119 U.S. App. D.C. 378, 343 F.2d 247 (1964), *rev'd*, 383 U.S. 541 (1966); *Wilhite v. United States*, 108 U.S. App. D.C. 279, 281 F.2d 642 (1960), and the District Court, *United States v. Carviness*, 239 F.Supp. 545 (1965); *United States v. Stevenson*, 170 F.Supp. 315 (1959). The only reversal of a decision to waive jurisdiction invoked a substantive ground, and broached no quarrel with the procedure employed. *United States v. Anonymous*, 176 F.Supp. 325 (1959). See *Watkins v. United States*, 119 U.S. App. D.C. 409, 343 F.2d 278 (1964). Thus, *Kent's* retroactive application would not "have the justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed." *Johnson & Cassidy v. New Jersey*, 384 U.S. at 731.¹³

Without doubt, the reliance by the juvenile authorities was reasonable. The law under which the appellants were

¹² In *Black*, *Harling*, and *Shioutakon*, this Court interpreted the Juvenile Court Act in a constitutional context. *Mordecai v. United States*, 252 F.Supp. 694, 702 (D.D.C. 1966). These nonretroactive holdings rise to the same constitutional dignity as *Kent*.

¹³ So long as the law has been established, and change is not clearly imminent, it makes absolutely no difference that the law does not bear the imprimatur of the United States Supreme Court. In this instance, the rulings of the highest court of this jurisdiction supported the practice of the Juvenile Court.

convicted, and their convictions affirmed was not the law of a medieval *ancien regime*, but a law supported by enlightened and progressive thinking, which itself served as the foundation for further judicial development. This factor of "reliance" adds ballast to the strong argument against making *Kent* retroactive.

c. The retroactive extension of Kent would significantly disrupt the administration of justice in this jurisdiction.

The Supreme Court's four nonretroactive decisions also rest upon a concern for the orderly administration of justice. Such consideration takes on added force in this case, since *Kent's* fiat so meagerly affects the fact-finding function of the criminal trial. *E.g.*, *Johnson & Cassidy v. New Jersey*, 384 U.S. at 727, 731-732; *Tehan v. Shott*, 382 U.S. at 418-419. The retroactive operation of *Kent* (and *Black*) would enable a great many prisoners to bring habeas corpus petitions and secure new waiver hearings.¹⁴ And since Juvenile Court jurisdiction ceases for persons over twenty-one years of age (11 D.C. Code § 1551), the District Court would have to conduct waiver hearings for prisoners past that age on a *nunc pro tunc* basis. *Kent v. United States*, 383 U.S. at 564-565. Thus, besides the strain placed on the Juvenile Court facilities, the calendars of the District Court would be clogged. In this regard, Judge Youngdahl has observed that the retroactive effect of holdings such as *Kent* and *Black* would "have a disruptive effect in this jurisdiction similar to the one which the [Supreme] Court attempted to avoid in *Linkletter* and *Tehan*." *Mordecai v. United States*, 252 F.Supp. 694, 703 (D.D.C. 1966). Indeed, all the other District Judges confronted by this issue have refused to apply *Kent* retroactively. *United States v. Wilkerson*, 262 F.Supp. 596 (D.D.C. 1967) (Gasch, J.); *Hughes v.*

¹⁴ All waiver determinations prior to *Black* were made without the presence of counsel.

United States, C.A. No. 90-66 (1966) (Matthews, J.); *Owens v. Weakley*, H.C. No. 241-66 (1966) (Walsh, J.).

Moreover, it must be doubted that this added burden on judicial resources would be worth the carrot, since it is probable that few pre-*Kent* waiver determinations would be reversed.¹⁵ A waiver of jurisdiction is exceptional, and occurs only when the Juvenile Court considers the alleged offense and the youth's prior criminal involvement unusually serious, and the offender so corrupt that prospects would be slender for his successful rehabilitation in the facilities and limited time available to juvenile authorities.¹⁶ It is unlikely that many of these prisoners would be able to convince the lower court that the offenses charged, their violent proclivities, and bleak chances for rehabilitation did not justify waiver.

¹⁵ By the same token, a retroactive application of *Black* would make little difference. "Unlike cases in which counsel is absent at trial or on appeal, it may confidently be assumed that [waiver determinations have been made] in the absence of counsel with scrupulous fairness." *Stovall v. Denno*, 87 Sup. Ct. at 1971.

¹⁶ The somewhat fewer criminals who were sentenced by the District Court for a period long enough to be still incarcerated two years after the *Black* and *Kent* decisions must be the most dangerous of this already exceptional group.

CONCLUSION

The justification for retroactivity depends upon the purpose of an innovation in the law, the nature and degree of reliance upon the former rule, and the administrative disruption inherent in applying the new rule to past convictions. Viewed in terms of these elements, *Kent's* departure from existing constitutional standards should not be given retroactive effect.

WHEREFORE, it is respectfully submitted that the judgment of the District Court be affirmed.

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